
United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT⁴

No. _____

NORTHERN PACIFIC RAILROAD COMPANY, BY CHARLES E.
SCHMIDT ET AL., MINORITY STOCKHOLDERS, PETITIONERS,

v.

THE UNITED STATES OF AMERICA, NORTHERN PACIFIC RAILWAY
COMPANY, ET AL.

CHARLES E. SCHMIDT, ET AL., MINORITY STOCKHOLDERS OF THE
NORTHERN PACIFIC RAILROAD COMPANY, PETITIONERS,

v.

THE UNITED STATES OF AMERICA, NORTHERN PACIFIC RAILWAY
COMPANY, ET AL.

**SUPPLEMENTAL BRIEF OF NORTHERN PACIFIC
RAILWAY COMPANY AND OTHER DEFENDANTS
IN OPPOSITION TO PETITIONS FOR APPEAL.**

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F. J. MC KEVITT,
D. R. FROST.

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Railway Company and other
Defendants.

FILED

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In the assignments of error filed by counsel for the stock-
holders and entitled "Assignments of Error of Northern Pacific
Railroad Company by Charles E. Schmidt and Other Minority

Stockholders", statements are made in numbers III, IV, XII, XVIII and XXII alleging, in substance, that the validity of the mortgages executed by Northern Pacific Railroad Company after 1875 and the validity of the plan of reorganization and of the foreclosure sales of 1896 were not put in issue by the complaint. Also that those issues were not passed upon in the report of the Master filed May 31, 1933, and the order entered October 3, 1935. This additional brief is for the purpose of pointing out that these matters were in issue, passed on by the Master, exceptions to the rulings of the Master taken by plaintiff, and said exceptions overruled and the report adopted.

Northern Pacific Railroad Company executed six mortgages after 1875. The validity of those mortgages was put in issue by subdivisions X and XVI of the complaint filed July 31, 1930. The Master, in his report of May 31, 1933, held:

"So far as the validity of the mortgages executed following the 1875 foreclosure are concerned, I hold that the United States has recognized them and acquiesced in and waived any possible want of power to their execution in the same maner and to the same extent as it has the foreclosure proceedings. Those mortgages were a part of that plan and inhered in its purpose and in the subsequent construction of the railroad." (p. 194)

To the above ruling plaintiff took its exception number XVII.

The validity of the plan of reorganization and of the foreclosure sales of 1896 was put in issue by subdivision XVIII of the complaint. The Master discussed the foreclosure sales and the reorganization plan on pages 195-203 of said report. On page 200 he ruled that the demurrer to subdivision XVIII should be sustained, and on page 203 he ruled that the plea of estoppel interposed to said subdivision should be sustained.

Plaintiff's exceptions number XVIII and XIX were taken to the Master's conclusion that the demurrer to subdivision XVIII of the complaint should be sustained and to his conclusion that defendant's plea of estoppel should be sustained.

As already shown, the order of the Court entered October 3, 1935, overruled all exceptions to the Master's report filed May 31, 1933, and adopted the report in its entirety.

For the convenience of the Court, we print in the appendix the Act of May 22, 1936, Ch. 444, 49 Stat. 1369, and the ruling of Judge Webster of April 29, 1938, and order entered April 30, 1938, denying the petitions of the stockholders for appeal to the Supreme Court.

Respectfully submitted,

L. B. DA PONTE,
F. J. MC KEVITT,
D. R. FROST.

June —, 1938.

APPENDIX.

Act of May 22, 1936, ch. 444, 49 Stat. 1369.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in the suit entitled United States of America, plaintiff, against Northern Pacific Railway Company and others, defendants, numbered E-4389, instituted and pending in the District Court of the United States for the Eastern District of Washington, under the authority and direction of the Act of June 25, 1929 (ch. 41, 46 Stat. L. 41), now on reference to a special master for hearing under an order of said court entered in said suit on April 21, 1936, a direct review by the Supreme Court of the United States by appeal may be had by any party to said suit of any order or decree of said district court entered upon a review of the report of the master to be made pursuant to said order of April 21, 1936, and also of the order or decree of said district court entered in said suit on October 3, 1935, as amended by an order of January 29, 1936. Such direct review by the Supreme Court of either or both of the said orders or decrees may be had by appeal taken within sixty days from the date of the order or decree of the district court entered upon a review of the report of the master to be made pursuant to the said order of April 21, 1936. The right of review of any final judgment, authorized by said Act of June 25, 1929, shall continue in force and effect.

Approved, May 22, 1936.

Copy of Ruling made on April 29, 1938, at conclusion of hearing on petitioners' motions to strike Order of March 30, 1938, and on their petitions for appeal:

On this 29th day of April 1938 the above entitled matter coming on for hearing on the Motion of the Northern Pacific Railroad Company by Charles E. Schmidt, and

others, Minority Stockholders, and the Motion of Charles E. Schmidt, and others, as intervening petitioners to strike from the record the Order of this Court entered March 30th, 1938, the Northern Pacific Railroad Company, Charles E. Schmidt, and others appearing by Mr. Robert L. Edmiston, of Counsel, and the Northern Pacific Railway Company, and others, appearing by Mr. D. R. Frost and U. S. A. by Mr. Walter L. Pope, of Counsel, the following proceedings were had: after hearing arguments of Counsel for all respective parties, the Court announced his ruling as follows:

Judge WEBSTER. The Motion of the Northern Pacific Railroad Company, by Charles E. Schmidt, and others, Minority Stockholders, and the Motion of Charles E. Schmidt, and others, as Intervening Petitioners, to strike from the record the Order of this Court entered March 30, 1938, which motion was filed on April 18, 1938, is DENIED, and the Order of March 30, 1938, is RE-AFFIRMED, for the reason that the Order allowing the appeal in this case was improvident and inadvertently granted. The petitions of the Intervenors for this appeal are, both denied. First, it is my opinion that there is nothing specific in the appeal that by any possibility could be construed as an appealable order in this case affecting these parties. I am also of the opinion that the record in this case, as it stands now, is not in a position to present the case on appeal to the Supreme Court of the United States, and the petitions will be denied. Now, if Counsel considers himself aggrieved by this ruling, he can take appropriate action against this Court in the Supreme Court of the United States. I will make my return to it, and the Supreme Court can decide whether this appeal can be sent up there; but my judgment is it's in no position to be sent up there, and, therefore, I exercise my discretion and refuse to do so.

Now, in looking back over this case: here is a petition in intervention filed approximately six years after this case was instituted. long after the preliminary Report of

the Special Master had been filed, long after exceptions had been taken to it by the Government on the one hand, and the Railway Company on the other; exhaustive briefs prepared, lengthy oral arguments had; a decree entered upon it, and then these intervenors seek in this very appeal they are presenting here to me to review orders that were made in these proceedings five years before this petition in intervention was filed. I think it is settled law that when one comes into a court to intervene they must accept the preceding case as they find it at the time they come in and their right to intervene is in strict subordination to the prevailing case. There can be no appeal by these intervenors from anything that this court did and entered upon the record in this Court in the form of decree prior to their coming into it. There has been no decree entered in this case since these petitioners filed this petition for intervention, and during all of these years "in captivity" that Counsel speaks of, the Northern Pacific Railroad Company filed its answer in this case six years ago this month, and there was no intervention by its stockholders until six years afterward, without a particle of explanation for the delay.

Now, in the filing of the answer in the case, surely after a case has been pending for six or seven years, and new parties come in and seek to subject themselves to the jurisdiction of the Court or undertake to file an answer, there must be some consent obtained by the Court. What about your answer? No application was made to this court for any leave to file that answer and having been filed without leave the Court strikes it.

Now, in addition to that, the exceptions that were argued and ruled upon by the Court in the order of March 9th, surely it must be plain that none but the parties to the suit can be affected by judgments, or orders or decrees in the particular litigation. I have already denied the petition to intervene in this case, and ordered this answer stricken from the record and now Counsel wants to take

exceptions to the order of the Court ruling upon the exceptions that had been filed, to which it was not a party, filed not by him at all, and in a proceeding in which he was not recognized as a party; an appeal from an order made in a proceeding in which he was not a party, and is not a party yet.

Now, that Statute that relates to this particular appeal to the Supreme Court of the United States is a special statute. It deals with a particular litigation—this litigation we are now in. In all other respects than the provisions of this Statute the appeal laws of the Country stand as they were before, and whatever that statute grants in the form of a remedy by the appeal to the Supreme Court of the United States is all that is granted by it, and there is nothing in this statute that contemplates an appeal to the Supreme Court by an intervenor in any such situation as this presented to this Court, and I am willing to present my position to the Supreme Court and let them rule on it.

MR. EDMISTON. Let the record show an exception please.

JUDGE WEBSTER. There are two petitions here for appeal, and they are both denied.

Copy of Order made on April 30, 1938, denying petitioners' Motion to Strike Order of March 30, 1938, and their petitions for appeal.

THIS MATTER came on to be heard upon the motion filed April 18, 1938, entitled "Motion of Northern Pacific Railroad Company by Charles E. Schmidt and others, minority stockholders, and motion of Charles E. Schmidt and others as intervening petitioners, to strike from the record the order of this court entered March 30, 1938," and upon the petitions for appeal to the Supreme Court of the United States entitled "Petition for Appeal of Northern Pacific Railroad Company by Minority Stockholders" and "Peti-

tion for Appeal of Intervening petitioners Charles E. Schmidt and other minority stockholders" and the court being fully advised in the premises, finds:

That the orders of the court entered on March 23, 1938, allowing said appeals, were made through inadvertence and mistake, and were improvidently granted, that the order or decree upon a review of the report of the special master filed July 26, 1937, from which an appeal is authorized by the Act of May 22, 1936, has not yet been made or entered; that the Northern Pacific Railroad Company is and has been since the date of the filing of its answer herein represented by counsel of record in this suit, who have not attempted to obtain any order allowing an appeal, and that counsel presenting said petitions for appeal are not authorized to represent said Northern Pacific Railroad Company or any other party to this suit.

IT IS THEREFORE ORDERED that said motion to strike be and the same is hereby denied, and it is further ordered that the said petitions for appeal, and each of them, be and the same are hereby denied.

DATED this 30th day of April, 1938.

J. STANLEY WEBSTER,
Judge of the U. S. District Court.